IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

CRIMINAL APPEAL NOS.9 AND 10 OF 2001

CRIMINAL APPEAL NO.9 OF 2001

Marie Claire Mc Ardle,
presently lodged at
Central Jail, Aguada,
Sinquerim, Bardez, Goa.

versus

Union of India,
as represented by
Shri A. J. Fernandes,
Superintendent of Customs,
New Customs House,
Mormugao, Goa.

Mr. Lalit Chari, Senior Advocate with Mr. J. P. D'Souza and Ms. C. Colaco, Advocates for the Appellant.

Mr. M. S. Joshi, Central Government Standing Counsel for the Respondent.

CRIMINAL APPEAL NO. 10 OF 2001

Lawrence W. Farrington,
presently lodged at
Central Jail, Aguada,
Sinquerim, Bardez, Goa.

versus

Union of India,
as represented by
Shri A. J. Fernandes,
Superintendent of Customs,
New Custom House,
Mormugao, Goa.

Mr. Lalit Chari, Senior Advocate with Mr. J. P. D'Souza and Ms. C. Colaco, Advocates for the Appellant.

Mr. M. S. Joshi, Central Government Standing Counsel for the Respondent.

CORAM: P. V. HARDAS, J.

DATED: 8TH MARCH, 2002.

ORAL JUDGMENT

The Appellants stand convicted for an offence

punishable under Section 20(b)(ii) of the N.D.P.S. Act,1985, and are sentenced to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs.1,00,000/- each in default to undergo Simple Imprisonment for one month, by the Special Judge, N.D.P.S. Court, Mapusa, Goa, in Special Criminal Case No.7/99 by Judgment dated 22nd December, 1998. The aforesaid conviction and sentence is challenged by the Appellants in the present Appeals.

2. The facts necessary for the decision of the Appeals are set out as under:-

P.W.5, Murli Nair, who in the month of December, 1998, was working in the Customs Department and was posted at Dabolim Airport sent a sepoy to call P.W.4, Shri A. J. Fernandes, who then at the relevant time was working as Superintendent of Customs and was also having the charge at the Dabolim Airport. On 12th December, 1998, P.W.5, Murli Nair, was near the screening machine in the departure lounge and at about 8.05 a.m., two passengers placed three suitcases on the conveyor belt of the screening machine. During the screening of the baggages, P.W.5, Murli Nair, noticed some unusual and similar pattern on the screening machine. P.W.5, Murli Nair, then checked their passports. He then sent a sepoy to call his immediate superior P.W.4, Shri A. J. Fernandes. P.W.4, Shri A.

J. Fernandes and another Officer advised P.W.5, Murli Nair, to allow both the persons to do their checking formalities. After the said two persons had checked in their baggage, they went towards the Immigration counter. After completing the formalities at the Immigration counter, the two persons approached the Customs counter. At the Customs counter, P.W.5, Murli Nair, accosted them and identified himself. Both the persons were then taken to the make up area and were asked to identify their baggages in the presence of the two panchas. The said two persons identified their baggages and they were checked with the counterfoil of the baggage tag in the possession of the said two persons. A superior Officer of P.W.5, Murli Nair, asked both these persons whether they were carrying any contraband but they replied in the negative. The said two persons were told to carry their suitcases to the Customs Office. Since the bags were heavy, the sepoy was asked to bring the said suitcases to the Office. The said two persons, subsequently shown as Accused Nos.1 and 2 opened their baggages. Original Accused No.2, Appellant in Criminal Appeal No.9/2001 and Original Accused No.1, Appellant in Criminal Appeal No.10/2001 opened the suitcase by adjusting the number of the combination lock and by producing key from his trouser pocket respectively. From each of the suitcases of the Accused, 9 packages were found.

Nothing incriminating was found in the zipper bag. The sepoys were directed to carry the suitcases to the Airlines counter and in the presence of the Accused and the panchas, all the 18 packages were weighed on the weighing machine. Before taking the packages for weighing, P.W.5, Murli Nair, had opened one of the packages and found that the package contained cylindrical as well as circular disk like substance which was dark brown in colour. The total weight of the 18 packages came to 25.60 kgs. Thereafter, all the 18 packages were placed in the suitcases and the suitcases were brought in the departure hall. All the packages except the earlier packets were opened and were found to contain similar dark brown substance. The outer wrapping consisting of transparent cellophene paper was removed and thereafter for some inexplicable reason all the pieces were mixed together. Two samples of 25 grams each was drawn and were placed in polethene bags and heat sealed. The polethene bags were thereafter put in green colour envelope which were packed and sealed with the seal having insciption "Goa Preventive Department Seal No.5. The first sample was labelled as Sample 'A' and the second sample was labelled as Sample 'B'. The said envelopes were then signed by P.W.5, Murli Nair, the two panchas and the Accused. The two suitcases marked as Exhs.E and F were also seized. The remaining quantity of the substance

was sealed in two different cartons labelled as C1 and C2. The outer wrappings were packed in another carton and were sealed as Exh.D. The Boarding Cards and the tickets along with the baggage tag were placed in cardboard box labelled as C1/C2. P.W.5, Murli Nair, then made a report to his superior P.W.4, Shri A. J. Fernandes and the report is at Exh.P.W.5/A.

3. A panchanama at Exh.P.W.3/A was drawn in the presence of P.W.3, James Braganza and one Domnic Costa. The panchanama is signed by the two panchas, the Accused and one Arun Pandye. The panchanama was concluded at 3.00 p.m.. P.W.4, Shri A. J. Fernandes, states that one Menino D'Souza from the Customs Department in the presence of the panchas had intercepted the two Accused and the said Menino D'Souza had informed P.W.4, Shri A. J. Fernandes that he would scribe the panchanama and so P.W.4, Shri A. J. Fernandes, had withdrawn from that place and had gone to the Arrival hall to do other duties. P.W.4, Shri A. J. Fernandes, further asserts that the panchanama was recorded by the said Menino D'Souza and P.W.4, Shri A. J. Fernandes, was not present when the panchanama was drawn. The said Shri Menino D'Souza who was the Seizing Officer, for reasons best known to the prosecution has not been examined as a witness.

4. On the same day, P.W.4, Shri A. J. Fernandes, issued summons to both the Accused vide Exh.PW4/A and PW4/C colly and recorded their statements which are at Exhs.PW4/B and PW4/D colly. After the seizure of the articles from the suitcases of the Accused, P.W.4, Shri A. J. Fernandes, by letter at Exh.PW2/A had handed over the drugs and other exhibits to the warehouse Officer.

5. P.W.2, Fatima Noronha, who at the relevant time was working as warehouse keeper on receipt of the letter Exh.PW2/A opened the warehouse to facilitate the deposit of the seized goods. On receiving the packages, P.W.2, Fatima Noronha, issued a receipt at Exh.PW2/C. The said packages were kept in a cupboard. The warehouse was then sealed. Necessary entries were effected in a register. The Sample 'A' was subsequently handed over by P.W.2, Fatima Noronha, to an Officer of the Customs Department for onward transmission to the Directorate of Food and Drugs Administration. The letter by which she was asked to deliver Sample 'A' is at Exh.PW2/D. The corresponding entries were also made in the register. On 14th December,1998, P.W.1, Mahesh Kaissare, received Sample 'A' from the Office of the Preventive Officer Customs Office of the Assistant Commissioner of Customs. On tallying the seals, she found the seals were intact and

tallied with the specimen seal impression. On weighing, he found that Sample 'A' weighed 24.66 grams with the individual weight of the four pieces being 4.33, 8.48, 6.38 and 5.47 grams. The four pieces comprising of Sample 'A' were analysed and on analysis it was found to contain hashish. The report of P.W.1, Mahesh Kaissare, is at Exh.PW1/C. Thereafter, on 21st October, 1999, P.W.1, Mahesh Kaissare, received three packets containing the remaining quantity of the substance seized and the Sample 'B'. The said packages had been sent by the Court for analysis. On analysis, it was found to contain hashish. The reports and the covering letter are at Exhs.PW1/D colly.

6. After completion of the investigation, a complaint through P.W.4, Shri A. J. Fernandes, came to be filed before the Special Judge, N.D.P.S. Court, Mapusa, Goa and the complaint was registered as Special Criminal Case No.70/79. The learned Special Judge, N.D.P.S. Court, Mapusa, vide Exh.5 framed a charge against both the Accused for offences punishable under Section 20(b)(ii) of the N.D.P.S. Act, 1985 alleging that the blue colour bag "Delsey Club", belonging to Accused No.1 Lawrence Farrington contained 14.1 kg. of hashish and the black colour bag "Carlton" belonging to Accused No.2 Marie Claire Mc Ardle contained 11.5 kgs. of hashish. Both the Accused abjured their guilt and

claimed to be tried. The prosecution in support of its allegation examined 6 witnesses. P.W.1, Mahesh Kaissare, is the Analyst who examined the samples and the remaining quantity of substance. P.W.2, Fatima Noronha, is a warehouse keeper. P.W.3, James Braganza, is the panch witness in whose presence panchanama at Exh.P.W.3/A was scribed. P.W.4, Shri A. J. Fernandes and P.W.5, Murli Nair, are the Custom Officers. P.W.6, Nazim Pradan, is an employee of the Indian Airlines who had checked in the baggages of the two Accused.

7. Mr. Lalit Chari, the learned Senior Advocate appearing with Mr. J. P. D'Souza, Advocate for the Appellants in both the Appeals has urged before me that (i) the quantity of substance which was found in the suitcases belonging to the Appellants was mixed together and samples of 25 grams each were drawn from the said "hotchpotch". The identity of substance that was recovered from the possession of each of the Accused cannot be established. (ii) The prosecution has not been able to establish that the balance quantity of the substance was kept in safe custody and could not have been tampered with. (iii) Menino D'Souza, who was the Seizing Officer and who had drawn the panchanama has not been examined. (iv) After noticing the substance in the bags of the Appellants, the said substance was not immediately seized but was

taken out of the room in which the bags were kept and there is no evidence to show that the substance which was ultimately seized was the same substance which was found in the bags of the Appellants and (v) the confessional statements of the two Accused, which were retracted by them cannot be made the sole basis for conviction in the absence of any reliable and cogent evidence against the Appellants.

8. Mr. M. S. Joshi, the learned Central Government Standing Counsel appearing for the Respondents/Union of India, in reply has urged (i) that despite the fact that the drugs recovered from the two Appellants separately were mixed, the entire quantity of drugs so recovered has been analysed by the Analyser who has opined the said drugs to be hashish. (ii) the evidence of P.W.2, Fatima Noronha, clearly indicates that the remaining quantity of drugs was kept in safe custody in the warehouse. (iii). The evidence of P.W.4, Shri A. J.Fernandes, and the evidence of P.W.5, Murli Nair, is corroborated by the evidence of P.W.3, James Braganza. (iv). The confessional statements, though retracted corroborated by other evidence can form the basis of conviction.

9. P.W.5, Murli Nair, in his evidence states that on 12th December, 1998, he was working in the

Department of Customs and was posted at the Dabolim Airport. He was present in the departure lounge near the screening machine along with one sepoy. At about 8.05 a.m., two passengers placed their three suitcases on the conveyor belt of the screening machine. The said passengers have been identified before the Court as Accused Nos.1 and 2. On observing the screening machine, he noticed unusual similar patterns in two suitcases. He, thnerefore, checked their passports on suspicion. Thereafter, he called a sepoy to call his immediate superior. P.W.4, Shri A. J. Fernandes, and another Officer who were in the arrival hall came towards him and they advised him to allow both the Accused to do their checking formalities. The Accused checked in their baggages and went to the Immigration counter and from there to the Customs counter. The Superintendent of Customs and P.W.5, Murli Nair, stopped the Accused and P.W.5, Murli Nair, identified himself to both the Accused and thereafter took both the Accused to the make up area along with the panchas. At the make up area, the Accused were to identify their baggages and after the Accused identified their baggages counterfoil of the suitcases, the baggage tags were attached to the ticket of the Accused. One Customs Officer questioned the Accused whether they were carrying any contraband and both the Accused replied in the negative. P.W.5, Murli Nair, therefore

asked the Accused to carry their suitcases to the Office of the Customs Department but since the bags were heavy the Accused could not carry their bags. A sepoy was therefore asked to carry the suitcases to the Office. The Accused No.1 removed a key from his trouser pocket and opened the blue "Delsey" make suitcase. The other black colour bag was opened by Accused No.2 by adjusting the combination lock. In the bag of Accused No.1, beneath the clothes, P.W.5, Murli Nair, found 9 packages wrapped in brown colour tape. In the bag belonging to Accused No.2, he also found 9 packages beneath the clothes. Nothing incriminating was found in the hand bag. The material so found in the bags was then replaced in the said bags and the sepoys were asked to take the suitcases at the Airlines counter where a weighing machine was available. The panchas, Accused and the Customs Officers along with the sepoys carrying the bags went to the Airlines counter. All the 18 packages were jointly weighed on the weighing machine and the total weight of the 18 packets was 25.6 kgs. Prior to the weighing, all the 18 packets, the 9 packages from the bag of Accused No.1, was found to weigh 14.1 kgs. and the 9 packets from the bag of Accused No.2, was found to weigh 11.5 kgs. Thereafter, all the packages were brought to the Customs counter in the Departure Hall in a suitcase. P.W.5, Murli Nair, thereafter removed the brown

adhesive tapes of all the remaining packages and it was found that all the packages contained cylindrical objects of dark brown colour. Each piece was found to be wrapped in a cellophene paper. The outer cover of the cellophene paper was removed and all the pieces were mixed together and two samples of 25 grams each was drawn. Thereafter, P.W.5, Murli Nair, along with others went to the Customs Office at the Arrival Hall where the two samples were weighed. The two samples were then put in a polythene bag and heat sealed. The polythene bag was then put in a green colour envelope, packed and sealed with the seal having the instruction "Goa Preventive Department Seal No.5". One sample was labelled as Sample 'A' and the other sample was labelled as Sample 'B'. The envelopes were then signed by the two panchas and the Accused. The remaining quantity of hashish was then put in cartons and sealed and the outer covering was signed by the panchas and the Accused. The outer wrapping of the cylindrical shape objects were also wrapped in another carton, packed and sealed. The boarding card tickets were also sealed. The panchanama Exh.PW3/A was drawn and all the proceedings concluded at about 3.00 p.m.. Thereafter, P.W.5, Murli Nair, sent a report Exh.PW5/A to his superior Shri A. J. Fernandes. In the cross-examination, P.W.5, Murli Nair, admitted that he has not signed the panchanama and he does not recollect

whether any part of the panchanama reflects whether the seizure was done on the ground floor in the Arrival Hall or near the Customs Office near the Arrival Hall. He also admits that the panchanama was not done under his instructions. He admits that the panchanama was drawn under his supervision. He also states that he had read the panchanama after it was scribed and found that the panchanama was correctly recorded. He also admitted that it was correctly recorded at page 8 of the panchanama that one photographer had come during the course of the panchanama and had taken some photographs. He has also stated that he does not recollect that his name appears in the panchanama as Seizing Officer and could not say anything that his name does not appear in the panchanama as the Seizing Officer. He admitted that it was wrongly recorded in the panchanama that the boarding card and tickets were of both the Accused. He admitted that it did not strike him at the time of scribing the panchanama that it was wrongly recorded. On being confronted with the boarding card and the tickets, he admitted that these do not bear his signature or the signature of the Accused. On perusal of the panchanama, he admitted that there is no reference in respect of seizure in the Arrival Hall and it appears that everything was done in the Departure Hall on the first floor. He admitted that after screening of the bags at the machine, the

security people put a self adhesive seal on the bags. He also admitted that the purpose of putting the security seal was to ensure that a bag cannot be opened without breaking the seal. He admitted that there was no mention in the panchanama that there was any security seal on the bag. He also admitted that it was not mentioned in the panchanama that the security seals had to be broken and opened. He also admitted that after the baggage passes through the screening machine it will continue to remain open to the passengers till it is checked in. He also admitted that in the report Exh.PW5/A, there is no mention about the security seal on the bags. He also admits that after the panchanama was concluded, P.W.4, Shri A. J. Fernandes, and other Custom Officers arrived at that place. He also admitted that in Exh.P.W.5/A there was no mention that they had gone to the ground floor for weighing the samples. Similarly, he also admitted that there was no mention that the sealing was done behind on the first floor. He also admitted that he was knowing the names of the panchas as he had seen the panchas once or twice at the Airport previously.

10. P.W.5, Murli Nair, has also admitted during the cross-examination that when he went to the ground floor for weighing the samples, all the 18 packets were already opened and at no stage of the ground floor were

all the 18 packets in their original wrappings. He also admitted that he was present when the photographs were taken. He admitted that the photographs of the seizure had appeared in the local newspaper but denied the suggestion that in the photographs the articles appeared that the outer wrapping was intact. He denied the suggestions that the suitcases were not opened by the Accused.

11. P.W.4, Shri A. J. Fernandes, in his evidence states that on 12th December, 1998, he was working as a Superintendent of Customs and was present at the Dabolim Airport. At about 8.10 a.m., when he was present at the Arrival Hall, one sepoy came and informed him that he was called by P.W.5, Murli Nair. He went to the first floor where P.W.5, Murli Nair was at the screening machine and P.W.5, Murli Nair, informed him that he had noticed something in the baggage of the Accused. P.W.4, Shri A. J. Fernandes, then informed P.W.5, Murli Nair, to allow the baggages and the passengers to be checked in. P.W.4, Shri A. J. Fernandes, then states that he came on the ground floor and informed one Pandye to go to the first floor and keep a watch. He further states that he informed P.W.5, Murli Nair, to keep a watch on the Accused. He further states that he informed one Menino D'Souza, Superintendent attached to the Departure Hall to keep

the panchas present as there was likely to be a seizure. After the Accused had checked in, the Accused went to the Immigration counter and from there to the Customs counter. P.W.4, Shri A. J. Fernandes, says that he intercepted along with Menino D'Souza and the two panchas and after verification of their passport, ticket, boarding card etc. handed over both the Accused to Menino D'Souza. Thereafter, Menino D'Souza took both the Accused for identification of the baggage and Menino D'Souza informed P.W.4, Shri A. J. Fernandes, that he would draw the panchanama. P.W.4, Shri A. J. Fernandes, thereafter withdrew from that place and went to the Arrival Hall to attend to his other duties. He states that the panchanama was recorded by Menino D'Souza and he was not present when the panchanama was drawn. He states that thereafter, he had issued summons Exh.P.W.4 to Accused No.1 and recorded his statement which is at Exh.PW4/B. he also states that he had issued summons Exh.P.W.4 colly to Accused No.2 and had recorded the statement of Accused No.2 which is at Exh.PW4/D colly. He further states that he had handed over the drugs and other exhibits to the warehouse Officer by letter Exh.PW2/A. He also admits in the examination-in-chief that he had seen the drugs placed on the table in the Arrival Hall when the photographs were taken at about 12.30 to 1.00 p.m..

12. In the cross-examination, he admits that he was not present at the time of seizure and has no personal knowledge of the seizure of the drugs. He admits that the drugs were displayed on the table in the Arrival Hall on the ground floor of the Airport. He also admits that he cannot exactly say where the panchas were when the seizure took place. He states that the two panchas were about 20 metres away from the table where the drugs were kept and the photographs were taken. He admits that the table on which the drugs were kept at the time of taking the photographs was 20 metres away from the Customs Office. He further states that he was called by the Commissioner at 12.30 p.m. at the place where the photographs were taken. When he arrived, the table was empty and thereafter, the drugs were brought and placed on the table but he does not know who brought the items on the table. He admits that different persons had brought the items at the table. He further admits that when the drugs were brought and placed on the table, Menino D'Souza was with the Accused in the adjacent Office. He admits that the photographs could be available in the Customs Office. He also admits that he has not stated anything about the photographs in the complaint. He then makes a very damaging admission and the said admission is reproduced below. "The two panchas for the attachment of the property are James Braganza and Domnic Mustaka

for last many years".

13. This witness further admits that after the photographs were taken, the drugs were taken to the adjacent Office in the Arrival Hall itself. He has also admitted that the Customs Departure area is on the first floor whereas the Arrival Hall is on the ground floor of the Airport terminal. This witness has further admitted that the purpose of the summons was to produce documents and not calling her to give statement under Section 67 of the N.D.P.S. Act, 1985. P.W.4, Shri A. J. Fernandes, has further admitted that Accused No.1 was not at all interrogated but was asked to narrate the story. Exh.PW4/D is not in the words of A1. He had also admitted that the first para of his statement at page No.1 is not entirely the narration of Accused No.1 as also the second para. This witness has further admitted that the photographs were taken at the Arrival Hall which is on the ground floor. He has feigned ignorance as to whether after the photographs the items were taken on the first floor.

14. P.W.3, James Braganza, the panch witness states that he was working for a Travel Corporation and was requested by the Customs on 12th December, 1998 at 9 o'clock to act as a panch witness. He states that the Customs Officer showed him two persons at the

Customs Departure counter. He identifies the said two persons as the Accused before the Court. P.W.3, James Braganza, further states that the Customs Officer told the Accused that they would like to take their search and to come to the make up area. At the make up area, the Accused were asked to identify their bags. P.W.3, James Braganza, further states that one Customs Officer by name Menino D'Souza, questioned the Accused as to whether they were possessing drugs and the Accused replied in the negative. After the identification of the suitcases, the Custom Officer then checked the baggage tags. Thereafter, the bags were taken to the Customs counter and the Accused were asked to open their respective bags. The Accused No.1 opened a blue colour suitcase with the help of a key which he was possessing. On opening the said bag, 9 packets were found beneath the clothes. The said packets were wrapped in brown colour tapes and sealed all around. One Custom Officer removed the tapes and found cylindrical chips and brown cigarette like substance. The pieces were individually wrapped in cellophene paper. Thereafter, Accused No.2 was asked to open her suitcase and she opened her suitcase by adjusting the combination lock. In her suitcase also 9 packets were found beneath her clothes. The packets were wrapped in cellophene paper with brown colour tape. One Custom Officer removed the outer wrapping and found

cylindrical chips and brown cigarette pieces. Each individual piece was wrapped in a cellophene paper. The articles so found in the suitcases of the Accused were replaced in their respective suitcases and the bags were then taken to the Airlines counter for weighing. The 9 packets found in the suitcase of Accused No.1 was found to weigh 14 kgs. while the 9 packets found in the suitcase of Accused No.2 were found to weigh 11.5 kgs. The second bag belonging to Accused No.2 did not contain any incriminating article. After weighing the packets, the suitcases along with the drugs were taken to the Customs Office and the 9 packets found in the suitcases were opened and were mixed up and put in a cardboard carton and taken to the Airlines counter. The outer wrapping of the packets was weighed and the weight was 1.2 kgs. P.W.3, James Braganza, further states that thereafter, they again returned back to the Customs counter and the cellophene cover was removed. Thereafter, two samples of 25 grams each were packed in two different bags and were heat sealed. The plastic bags were then placed in green colour envelopes and then the envelopes were sealed and signed by the Accused and the panchas. The green envelopes were marked as Exh.A and Exh.B. The remaining quantity of the substance was then packed in a plastic bag and then heat sealed and thereafter placed in cardboard carton and sealed. The outer

wrapping of the substance was put in another carton and sealed. P.W.3, James Braganza, further states that prior to this, the boarding cards were collected by the Customs as also the tickets. P.W.3, James Braganza, further states that a panchanama was drawn and the said panchanama Exh.PW3/A was signed by the Accused, the two panchas and one Customs Officer.

15. In cross-examination, P.W.3, James Braganza, has admitted that he has been attending his duty at the Airport for the last 5 years and because of his duty at the Airport, he is acquianted with the Officers of the Customs since last 5 years. He has further admitted that the boarding cards and the tickets at Exhs.I, J, H and G were neither signed by the Accused nor by the Customs Officer. He admitted that the recitals in the panchanama that the boarding cards and the tickets were signed by the Accused and the Customs Officer was incorrectly recorded. This witness has further admitted in the cross-examination that when on the second occasion the substance recovered from both the suitcases was mixed up and placed in a cardboard box was taken on the first floor for weighing. According to him, the suitcases were kept on the ground floor. According to him, the Customs Office where the bags were kept were not on the same floor where the items were weighed. According to him, there is a place

called Customs counter after the Immigration counter and nothing was done pertaining to the panchanama at the Customs counter. According to this witness, from the make up area, the sepoys had carried the suitcases to the Customs Department. In the cross-examination, this witness has also admitted that he knows P.W.4, Shri A.J. Fernandes, for the last 7 years. He states that he does not remember whether P.W.4, Shri A. J. Fernandes, was present during the entire panchanama. He also states that he does not remember whether Superintendent Menino D'Souza was present during the entire panchanama. He also states that he does not remember specifically who did the weighing, packing and sealing.

16. This witness admits that as the search was going on simultaneously with the recording of the panchanama. According to him, the writing of the panchanama commenced after the panchas reached at the Customs Office. According to him, the panchanama commenced at the place where the substance was found before the items were taken for weighing. He admits in the cross-examination that a photographer was brought to take the photographs of the items. According to him, he does not remember at which place the photographs were taken. He also does not remember at what point of time the photographs were taken. He

states that he cannot say whether the photographs were taken before or after the sealing. He also states that he was not in any of the photographs.

17. P.W.2, Fatima Noronha. states that on 12th December, 1998, at about 11.15 p.m., P.W.5, Murli Nair, along with P.W.4, Shri A. J. Fernandes. had come to her house with 7 packages. According to her, she received the sealed packages along with letter Exh.PW2/A. Since, it was a holiday, P.W.4, Shri A. J. Fernandes and P.W.5, Murli Nair, had brought an Office Order issued by the Commissioner of Customs directing her to open the warehouse to facilitate the deposit of the seized goods. The said Order of the Commissioner is at Exh.PW2/B. She further states that on receipt of the packages, she issued a receipt Exh.PW2/C. The said packages she claims to have kept in sealed packets in the cupboard in the warehouse. She further states that she had received a letter at Exh.PW2/D asking her to hand over sample labelled as Sample 'A' for analysis. She admits that the entries regarding the receipt of the property were taken in a register. In cross-examination, this witness has admitted that she had not brought the warehouse register. She also admitted that in other cases, she had brought the warehouse register to the Court. According to her, whenever any packet is taken out of the warehouse, an

entry is made to the effect in the register. In the re-examination by the Public Prosecutor, this witness admitted that she can produce the register. Unfortunately, though, the witness expressed her readiness to produce the register, the register was in fact never produced before the Court during the evidence.

18. From the evidence of the prosecution witnesses, it is apparent that some substance was found in the suitcases in the Departure lounge on the first floor. The panchanama Exh.PW3/A was also scribed on the first floor. However, the photographs were taken on the ground floor. Unfortunately, in this case, the photographs were not produced during the evidence. The photographer who had taken the photographs is also not examined. No Officer of the Customs is examined who is said to have carried the drugs from the first floor to the ground floor for the purpose of taking the photographs.

19. According to the prosecution, two separate packets of substance was recovered from the suitcases of Accused No.1 and Accused No.2. For some inexplicable reason the two substances so recovered from the individual baggages of the Accused were mixed up together and two samples weighing 25 grams each was

drawn. Thus, no sample was drawn in respect of the substance seized from each Accused. The sample so drawn represents the composite substance which was recovered from the two suitcases of the Accused. On analysis, no doubt the sample labelled as 'A' is shown to be hashish but there is no individual analysis of the substance that was recovered from the suitcases of the Accused. Thereafter, during the course of the Trial at the behest of the learned Special Judge, Sample 'B' and the remaining quantity was sent for analysis and P.W.1, Mahesh Kaissare, has confirmed the said substance to be hashish. In the entire prosecution evidence, there is no explanation whatsoever as to why the substances recovered from both the suitcases were mixed up together.

20. If, on search, certain substance is recovered which is suspected to be a drug, the prompt seizure of the said substance at the very place of its detection assumes great importance. The detection, prompt seizure and sealing of the substances affords guarantee to the Court that the substance which is sent for analysis is the same substance that was seized from the possession of the Accused. In this background, the comparison of the seals is, therefore, not an empty formality. The comparison of the seals is, therefore, one of the links in the chain which establishes that

the substance which was seized from the possession of the Accused is the very same substance which has been received by the analyser for analysis. In order to complete this chain, there is a very important link which the prosecution has to prove and that is, that the substance after its detection is not allowed to be carried anywhere else but is seized and sealed promptly. Once, the prosecution is able to forge this chain, the Court is satisfied that the same substance which is seized from the possession of the Accused is sent for analysis. Ofcourse, the prosecution has also to establish that during the interregnum i.e. from the time of seizure till the time the analyser receives it, the substance was kept in safe custody to rule out any possibility of tampering.

21. Mr. Lalit Chari, the learned Senior Advocate appearing for the Appellant, during the course of his argument, has attempted to break this chain to show that there is no satisfactory evidence regarding the prompt seizure and sealing of the substances after it was detected. According to him, if there is a weak link in this chain, no conviction can be sustained on the basis of the evidence so adduced.

22. From the evidence of the prosecution witnesses, a very disquieting feature emerges from it.

The Seizing Officer Menino D'Souza, for reasons best known to the prosecution has not been examined at all. The panchanama at Exh.PW3/A is not signed by P.W.5, Murli Nair. P.W.4, Shri A. J. Fernandes, claims that he has no personal knowledge regarding the scribing of the panchanama. The scribe of the panchanama has also not been examined. The prosecution has examined panch witness P.W.3, James Braganza, to prove the recitals in the panchanama. P.W.3, James Braganza, claims to be acquainted with P.W.4, Shri A.J. Fernandes, and according to P.W.4, Shri A. J. Fernandes, the two panch witnesses for the attachment of the property have been prosecution witnesses for last many years. This is what he says in the cross-examination "the two panchas for the attachment of the property are James Braganza and Domnic Custaca for last many years". A panchanama is an extremely important piece of evidence as it is a contemporaneous document evidencing the search and seizure of incriminating article from the possession of the Accused. The panchanama has strong corroborative value and corroborates not only the evidence of the panch but also the evidence of the Seizing Officer.

23. Another disquieting feature in this case is the taking of photographs. According to P.W.3, James Braganza, the scribing of the panchanama commenced with

a detection of the drugs. On two or three occasions, the drugs and the suitcases were taken for weighing. The panchanama at Exh.PW3/A while referring to the fact that the packets recovered from the suitcases were taken for weighing, makes no mention about the place where they were taken. Though, a reference is made to the Airlines counter, no reference is made in the panchanama as to the place where the Airlines counter is located. From the perusal of the panchanama, it appears that the panchanama was drawn at the Customs counter at the Departure lounge. P.W.3, James Braganza, in his substantive evidence says "there is a place called Customs counter after the Immigration counter. Nothing was done pertaining to the panchanama at the Customs counter. The Customs counter which is after the Immigration counter is in the Departure Hall". P.W.5, Murli Nair, in his report at Exh.PW5/A states "we then requested both the passengers to carry their respective baggages to the Customs Departure area for detailed examination. A perusal of the report further shows that the suitcases did not leave the Customs Departure area and the substance came to be seized and sealed at that place. As per the evidence of P.W.3, James Braganza, he was called and shown two persons at the Customs Departure counter. His evidence further reveals that the bags were taken to the Customs counter and it was at that place that some substance

was recovered from the bags of the two Accused. His evidence also reveals that after weighing the substance, they came back to the Customs counter and it was at that place that the substance was seized and sealed. P.W.4, Shri A. J. Fernandes, does not throw any light on the mystery as to where the panchanama Exh.PW3/A was scribed. All he says is that it was Menino D'Souza who had recorded the panchanama. P.W.5, Murli Nair, states that he had accosted the Accused at the Customs counter. He states that after the Accused identified their baggages, they were taken along with their bags to the Office. He states that after weighing the packages, the suitcases were brought to the Customs Office in the Departure Hall. According to him, the weighing of the samples was done on the Customs physical balance in the Customs Office at the Arrival Hall. In the cross-examination, he also reiterates that from the Customs Office, they had gone to the Airlines counter for the purpose of weighing. Thus, the evidence tendered by the prosecution is not satisfactory regarding the place where the substance recovered from the suitcases of the Accused was seized and sealed. Admittedly, from the evidence, the Customs counter is on the first floor whereas there is a Customs Office on the ground floor. The panchanama is completely silent on this aspect and throws no light on this aspect.

24. Another disquieting feature which emerges from the prosecution is whether the panchanama was being scribed on the first floor or on the ground floor. The substance which was recovered from the suitcases of the Accused was then taken to another place where it was displayed on the table and a photographer was called to take the photographs. P.W.4, Shri A. J. Fernandes, in his evidence states that he was called by the Commissioner of Customs and when he had gone, he had found the table empty. Thereafter, some persons had brought and kept the substance on the table and photographs were taken. What was the purpose in removing the alleged contraband from the place of its detection to a different place altogether for the purpose of photographs. If the photographs were being used as a corroborative piece of evidence, the photographs could be taken at the place where the substance was detected and it was seized and sealed. There is no justifiable reason for removing the substance from that place to a different place. This has been done in a most casual manner. The substance was allowed to be taken by some sepoys of the Customs Department who have not been examined. The said substance was removed from the place of its detection throwing all caution to the winds. The sepoys who had carried the substance have not been examined as witnesses. In whose custody was the

substance all this time is a question which remains unanswered from the prosecution evidence. P.W.4, Shri A. J. Fernandes, does not know. P.W.5, Murli Nair, does not refer to the photographs at all in his Examination-in-Chief. He admits in the cross-examination that photographs were taken on the ground floor. For how long the substance was out of the possession of the Seizing Officer is not known as the prosecution has not examined Menino D'Souza. There is no satisfactory evidence at all that during all this time the substance was in the custody of a responsible Officer who could watch that it was the same substance that was recovered from the bags of the Accused. Ofcourse, it appears that the photographs had been taken for publishing it in the newspaper evidencing the seizure of contraband drugs. If this was the purpose, the purpose could have been served by taking the photographs at the place where the drugs were detected, seized and sealed. There is no justifiable reasons whatsoever for removing the drugs from that place. The panchanama is completely silent in respect of this. The panchanama only makes a passing reference to the fact that some photographs were taken. The panchanama ought to have reflected the place where the photographs were taken and for the period of time the articles seized had been removed from the place of detection. The casual approach to the detection of serious

offences under the N.D.P.S. Act, 1985 is highly disturbing.

25. Apart from this, the prosecution evidence in respect of the safe custody of the narcotic in the warehouse is not satisfactory at all. The evidence of P.W.2, Fatima Noronha, does not inspire confidence that the narcotic which was deposited was in safe custody in the warehouse till ultimately it was removed. She has admitted in the cross-examination that she had not brought the warehouse register. She had expressed her readiness to produce the warehouse register but for some inexplicable reason the warehouse register was not produced at all. According to me, the fact that the narcotic drug which is alleged to have been detected in the baggage of the Accused was not seized immediately and was allowed to be removed from the place of detection and there is no satisfactory evidence regarding the custody of the narcotic substance during that time, is a circumstance which seriously affects the veracity of the prosecution case. The fact that the evidence in respect of the safe custody of the substance in the warehouse is lacking, is another circumstance which goes against the prosecution. Therefore, the evidence of the panch witness P.W.3, James Braganza, needs to be scrutinised with care.

26. P.W.3, James Braganza, admits in the cross-examination that he was acquianted with the Officers of the Customs since last 5 years. P.W.4, Shri A. J. Fernandes, admits that the two panchas are the witnesses for the last many years. It is true that merely because a person has been a witness in 3 or 4 trials would not denude him of his status of an independent witness. This fact may at the most put the Court on guard and would require a careful scrutiny of his evidence. The statement of P.W.4, Shri A. J. Fernandes, that the panch witnesses had been witnesses of the Department for the last 5 years is a very damaging statement to the prosecution. This means that since last 5 years, the Department has been summoning these two witnesses as panch witnesses. This would certainly strip the witnesses of their status as independent witnesses and would attach a label of obliging witnesses. A perusal of the examination-in-chief and cross-examination of the testimony of P.W.3, James Braganza, would show that there is a variance between the evidence and the recitals in the panchanama. Even if the submission of the learned Advocate for the Respondents is accepted that the variance is on minor aspects, the other evidence, to which I shall presently advert, leads to an inference that P.W.3, James Braganza, was not present when the panchanama was scribed.

27. P.W.3, James Braganza, states that the suitcases were never taken at any time to the Customs counter. He further states that he does not remember whether Superintendent Menino D'Souza was present during the entire panchanama. He also does not remember specifically who did the weighing, packing and sealing. He admits that he does not recollect at which place the photographs were taken. He states that he does not remember at what point of time the photographs were taken. He further states that he cannot say that the photographs were taken before or after the sealing. He states that he cannot say at what stage the photographer was brought. He does not know who was the photographer.

28. P.W.3, James Braganza, curiously is able to depose about the contents of the panchanama though with some variations. On the crucial aspect of the photographs, this witness does not assist the prosecution at all. According to the other witnesses, the substance that was seized was removed from the room where it was detected and was laid on a table where photographs were taken. If, P.W.3, James Braganza, was present, he ought to have recollected the place where the photographs were taken and at what point of time the photographs were taken. His answer that he does

not know if the photographs were taken before or after the sealing is a statement indicative of the fact that he was not present at all. The report of P.W.5, Murli Nair, at Exh.P.W.5/A does not disclose anything about the photographs. In fact, the report shows that the search and the sealing was one uninterrupted continuous process. Thus, I find that the evidence of the prosecution does not inspire confidence at all.

29. The prosecution then claims conviction on the confessional statements of the Appellants recorded by P.W.4, Shri A. J. Fernandes. The confessional statements are at Exhs.PW4/B and PW4/C colly. Incidentally, it may be stated that these statements were retracted by the Accused. P.W.4, Shri A. J. Fernandes, states that the purpose of the summons was to produce documents and not calling on the Appellants to give their statements. He even goes to the extent of saying that the Accused No.2, Marie Claire Mc Ardle, was free to move at the airport. She was even free to leave the airport if she desired. This statement of P.W.4, Shri A. J. Fernandes, is unbelievable. After the detection of the substance, which the Officers claim to be hashish, it is unbelievable that they would allow the Appellants to move freely or to leave the airport if they so desired. Though, the Appellants were not formally arrested, it is logical to presume

that the Appellants were detained and were in the custody of the Officers of the Department. At the foot of the confessional statements, the Appellants have signed in their own handwriting that the above statement is correctly recorded as per their say without any force, threat or duress. There is nothing in the evidence of P.W.4, Shri A. J. Fernandes, which would suggest that before recording the statement of the Appellants he had satisfied himself that the statement was a voluntary statement. There is nothing in the evidence of P.W.4, Shri A. J. Fernandes, that he had questioned the Appellants regarding the voluntary nature of their confession. Thus, the prosecution evidence is silent in respect of the confessions being voluntary. Apart from this, there is no other evidence on the basis of which a conviction could be sustained. A retracted confession, which the prosecution has not been able to establish as voluntary can never be made the basis of conviction.

30. Thus, I find that the prosecution has not been able to establish the offence against the Appellants. The prosecution evidence falls woefully short of inspiring the confidence of the Court. Thus, I am unable to agree with the findings recorded by the learned Trial Court.

31. In the result, therefore, Criminal Appeals No.9/2001 and 10/2001 are allowed. The conviction and sentence of the Appellants, for an offence punishable under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985, as passed by the Special Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, on 26th December, 2000, in Special Criminal Case No.7/99, is hereby quashed and set aside and the Appellants are acquitted of the aforesaid offence. The Appellants be released forthwith, if not wanted in any other case.

(P. V. HARDAS)
JUDGE